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No. 343

In the Supreme Court of the United States

OCTOBER TERM, 1964

FRED A. ALEXANDER, et al.,
Petitioners,

vs.

PACIFIC MARITIME ASSOCIATION,
a non-profit corporation, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief for the Respondent Pacific Maritime Association in Opposition

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 332 F.2d 266. The earlier opinion of the court of appeals is reported at 314 F.2d 690. It held that the district court had no jurisdiction over petitioners' original complaint because it was based solely on alleged unfair labor practices, but remanded the case with leave to petitioners

to amend to state a cause of action under § 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C. § 185(a), for breach of the collective bargaining agreement. It is reprinted as pages 1-9 of the appendix hereto.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5) was entered on May 6, 1964. The petition for writ of certiorari was filed August 3, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether - in an employes' suit brought under § 301(a) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 185(a), for alleged breach of the applicable collective bargaining contract and seeking damages and other relief available only in equity - an appeal can be taken under 28 U.S.C. § 1291 or 28 U.S.C. § 1292(a)(1) from an order of the district court staying action upon all further proceedings pending petitioner's exhaustion of their administrative remedies under the contract grievance-arbitration procedures.

We suggest that the other questions set forth in the petition can be ignored.

STATUTES INVOLVED

Jurisdiction of the cause is claimed under § 301(a) of the Labor Management Relations Act, as amended, 29 U.S.C. § 185(a). It reads:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States

having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Appellate jurisdiction is claimed on the basis of 28 U.S.C. § 1291. It reads:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Appellate jurisdiction is also claimed, in the alternative, on the basis of 28 U.S.C. § 1292(a), as amended. It provides in pertinent part:

"(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"

Consideration may also be appropriate to 28 U.S.C. § 1292 (b). It reads:

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he

shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

STATEMENT

Petitioners are ship clerks employed in the San Francisco Bay Area. International Longshoremen's and Warehousemen's Union (ILWU) is the certified collective bargaining agent for ship clerks at that port. Pacific Maritime Association (PMA) is the employers' collective bargaining agent. ILWU and PMA have a collective bargaining agreement covering the terms and conditions of employment of ship clerks in San Francisco. Many ship clerks are registered; others, including petitioners, are not. The distinction is described in some detail in an answer to an interrogatory (Tr. R. 137-149; PMA App. 10-14).

Petitioners' original complaint was that ILWU and PMA cooperated in discriminating against petitioners - who are not members of ILWU - and in favor of union members as to employment and employment benefits under the collective bargaining agreement. The district court in an unreported decision dismissed the complaint on the ground that jurisdiction over the alleged unfair labor practices lay exclusively in the National Labor Relations Board under *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, so that petitioners had no standing to sue in the district court for breach of contract. The court of appeals, 314 F.2d 690 (PMA App. 1-9), held that the complaint as then phrased did not allege a breach of contract and ac-

cordingly concurred in the district court's ruling as to jurisdiction. The court of appeals also noted that in *Smith v. Evening News*, 371 U.S. 195, an opinion filed while the appeal was pending, this Court had stated that individual employes otherwise having standing to sue might bring an action under § 301(a) of the Labor Management Relations Act for breach of the applicable collective bargaining agreement even though the acts complained of were also unfair labor practices. The court of appeals remanded with leave to amend to state such a cause of action.

The amended complaint (Pet. App. 7-54) alleges the existence of a collective bargaining agreement between ILWU and PMA covering the terms and conditions of employment and compensation and other benefits of ship clerks[1] and alleges it includes provisions that "there shall be no discrimination in connection with any action subject to the terms of this agreement either in favor of or against any person because of membership or non-membership in the union" and requiring the maintenance of an adequate working force of ship clerks.[2] The amended complaint also restates the original charges of unlawful discrimination in respect to various provisions of the collective bargaining agreement.[3] This complaint, if brought during the days of separate law and equity proceedings, could have been heard only in equity. It prays for a declaration of the rights of petitioners under the agreement, a mandatory injunction directing compliance with the collective bargaining agreement, an accounting by ILWU and PMA, the imposition

1. Pet. App. 8, 10, 13, 14, 16, 23, 25, 34.

2. Pet. App. 15.

3. Pet. App. 16, 17, 19, 20, 22, 23, 25, 28, 29, 41, 44. These claims were held beyond the jurisdiction of the courts in the earlier opinion in 314 F.2d 690 (PMA App. 1-9).

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of a trust in petitioners' favor upon funds held by the trustees of union-employer welfare and pension funds, and damages, including loss of wages, by reason of breaches of the collective bargaining agreement.[4]

Respondent PMA filed motions for a separate trial on the issue of standing to sue, to strike allegations held beyond the court's jurisdiction in the earlier opinion (PMA App. 10-14), for a more definite statement, for summary judgment, to dismiss for lack of jurisdiction, and for a stay of proceedings pending exhaustion of administrative remedies under the grievance and arbitration provisions of the collective bargaining agreement.[5] Petitioners moved for an order imposing sancitions on PMA for its alleged failure fully to answer petitioners' interrogatories.[6]

Summary of reasons why a writ should not be granted.

The court of appeals held that petitioners were premature in taking an appeal from a district court order staying court action in a suit seeking equitable relief for alleged violations of a collective bargaining contract until petitioners exhausted the contract grievance-arbitration procedures that were available to them. This order stayed action on respondent's motions for a separate trial on the issue of standing to sue, to strike, for a more definite statement, to dismiss for lack of jurisdiction and for summary judgment as well as staying action sought by petitioners.

The governing rules of law, which were correctly applied by the court of appeals, are clear and are uniformly applied by this Court and all the circuits. The stay was a step in the judicial consideration of multitudinous claims presented in the complaint, which sought an accounting and other relief

4. Pet. App. 51-54.

5. See Tr. R. 119-123; 59; 57-59; 57; 56-57.

6. See Tr. R. 150-168.

in equity. The order was in no sense final, for the district court retained jurisdiction while withholding action until there was a resolution of such issues as are presentable through the contract grievance-arbitration procedures. The stay order, having been entered by a court that was already exercising equity jurisdiction at the instance of petitioners' complaint, was not an injunction against proceeding with an action at law. Accordingly the stay order of the district court was not appealable under § 1291 or § 1292(a)(1).

Denial of the writ will not preclude the raising of important issues on appeal from interlocutory orders where such is proper. Congress has provided that interlocutory appeals on important issues can be presented under 28 U.S.C. § 1292(b). The steps to perfect an appeal thereunder were not taken here. In appropriate cases they can be taken.

The substantive issues here claimed to be important are of no merit.

ARGUMENT

The principal question presented to this Court on the pending petition is whether, in a suit under § 301 of the Labor Management Relations Act seeking equitable relief for alleged breaches of a collective bargaining agreement, an order is appealable that stays all court proceedings until there shall have been compliance with the contract requirement that there be resort to the grievance-arbitration provisions of the agreement with respect to the alleged breaches. Petitioners' "Question Presented" numbered 4 may perhaps be fairly subsidiary to the basic substantive issue whether compliance with arbitration procedures was properly ordered by the district court. Petitioners' "Questions Presented" numbered 5, 6 and 7 relate to possible unfair labor practices, which are outside the jurisdiction of the district court and hence were not carried forward to the court of

appeals or properly includable in this petition. These issues were disposed of by an earlier court of appeals opinion reported at 314 F.2d 690 (PMA App. 1-9). Questions numbered 2 and 3 seek to present issues as to the validity of the ILWU-PMA collective bargaining agreement. Such matters are not proper for consideration on this petition.

The court of appeals directed its attention to the single question whether the stay pending exhaustion of the administrative remedy was immediately appealable.

Petitioners present no basis for granting a writ of certiorari under the rules of this Court.

The petition for a writ of certiorari should be denied because the court of appeals judgment is in accord with decisions of this Court, because there are no decisions of courts of appeals in conflict with the decision below, and because to follow the grievance-arbitration provisions of the collective bargaining agreement will not cause petitioners unjustifiable injury.

1. The decision of the court below is supported by the decisions of this Court.

Goodall-Sanford, Inc. v. The United Textile Workers, 353 U.S. 550, on which petitioners principally rely, is not contrary to the decision below. In that case a labor union instituted an action for the purpose of obtaining specific performance of an arbitration provision in its collective bargaining agreement. The holding of this Court that the district court's order for specific performance was a final judgment and therefore appealable was specifically based on the ground that it granted all the relief that had been prayed for. The facts in the instant case are fundamentally different; petitioners did not ask simply that the court require respondents to use the grievance-arbitration procedure, they sought a variety of remedies for contract

breach. The *Goodall-Sanford* opinion also distinguishes a stay order from a decree specifically enforcing plaintiff's demand that defendant come into the grievance-arbitration procedure. The latter, but not the former, is a final decision within the meaning of 28 U.S.C. § 1291. To the same effect, see *Armstrong-Norwalk Rubber Corp. v. Local Union No. 283*, 269 F.2d 618 (2 Cir. 1959).

The decision of the court below that the district court order is not an injunction appealable under 28 U.S.C. § 1292(a)(1) is similarly in accord with the decisions of this Court. Here the petitioners' complaint called upon the district court to exercise equity jurisdiction. In doing so, it stayed further proceedings with regard to the petitioners' clairs. It entered a stay order. Petitioners claim this is an appealable injunction. The *Baltimore Contractors* opinion analyzes this problem in detail. It concludes that a stay order entered by a court that is already exercising equity jurisdiction is not an injunction but is merely a "step in controlling the litigation before the trial court". While the opinion recognizes that this conclusion is based on a distinction that has in it "elements of fiction in this day of one form of action", it holds that this distinction continues to be appropriate in interpreting the long-standing statutory provisions as to appealability of interlocutory orders. *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 182-185; *Wilson Brothers v. Textile Workers*, 224 F.2d 176 (2 Cir. 1955), *cert. den.* 350 U.S. 834.

2. There is unanimity among the circuits that orders staying equity proceedings pending arbitration under collective bargaining provisions are not appealable. *Ross v. Twentieth Century-Fox Film Corp.*, 236 F.2d 632, 633 (9 Cir. 1956); *Kirschner v. West Company*, 300 F.2d 133, 134 (3 Cir. 1962); *Armstrong-Norwalk Rubber Corp. v. Local Union No. 283*, 269 F.2d 618, 620-621 (2 Cir. 1959).

Petitioners cannot rely on *Hudson Lumber Co. v. U.S. Plywood Co.*, 181 F.2d 929 (9 Cir. 1950) since that decision must be now regarded as having no weight in view of the decisions of this Court in *City of Morgantown v. Royal Insurance Co.*, 337 U.S. 254 and *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, and the more recent decisions of the Ninth Circuit.

3. Petitioners will not be unjustifiably hurt by exhaustion of the contractual arbitration provisions: If the arbitrator finds that petitioners' rights were violated by their employer, appropriate relief will be granted by the arbitrator or by the court on the basis of the arbitrator's findings. If petitioners are dissatisfied, they then have their remedies in the courts. *Cf. Humphrey v. Moore*, ... U.S. ....., 11 L.ed. 2d 370, L. W. 4055 (Jan. 6, 1964).

The petitioners do not raise any issue on the merits that would justify this Court in granting a writ.

Petitioners complain that they, not having been registered by joint action of ILWU and PMA under the registration provision of the collective bargaining contract, are denied the conditions the contract gives only to those having been so registered.[7] Petitioners would have all the relief they seek if they were given registered status with all the prequisites thereof. The district court has required petitioners to seek such status through the contract grievance-arbitration procedures.

The fundamental position of petitioners is that individual employes should not have to follow the grievance procedure

7. The explanation regarding the nature and process of registration and its significance to decasualization of waterfront work on the Pacific Coast - which respondent PMA has given in answer to an interrogatory - is set forth in Appendix 2 (PMA App. 10-14).

of their collective bargaining contract if they choose to proceed under the contract, rather than before the Labor Board, to litigate claims that their union and their employer have acted in a way that is both a contract violation and an unfair labor practice. Petitioners attack the actions of the union and the employer in the negotiation and administration of the collective bargaining contract, asserting that they are discriminating against the plaintiffs because of their lack of union membership. Petitioners contend that the union and the employer are more than equal adverse parties in the grievance-arbitration procedure of the collective bargaining contract and, therefore, that the individual employe should not have to follow the contract grievance-arbitration procedure. There are at least three answers to this contention.

1. A controlling difficulty with this contention is that petitioners voluntarily chose to litigate under their contract and to rely on the *Smith v. Evening News* doctrine limiting the pre-emption principle. When petitioners chose to litigate under the contract rather than before the Labor Board, they necessarily chose to accept the contract grievance-arbitration procedure as the initial step in their litigation. Had they wished to avoid using the grievance-arbitration procedure they might have followed the usual course of presenting their contentions in a Labor Board charge.

2. The federal labor law requires exhaustion. The requirement of exhausting the grievance-arbitration procedures of the collective bargaining contract is unassailably established as a vital and essential part of federal law being fashioned in this area of labor relations. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448; *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574;

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593; *John Wiley and Sons, Inc. v. Livingston*, ... U.S. ....., 11 L. ed. 2d 898, 32 L. W. 4285 (Mar. 30, 1964). These cases hold that the duty to arbitrate should be enforced "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the alleged dispute", *Warrior and Gulf, supra*, and that the trial courts have no business to weigh the merits of the grievance nor determine whether the particular language in the contract will support the claim, where the contract calls for submission of all grievances to arbitration and the court determines that the contract calls for arbitration of the alleged grievances. *United Steel Workers v. American Manufacturing Co., supra; John Wiley and Sons v. Livingston, supra; Drake Bakeries, Inc. v. Local 50*, 370 U.S. 254; *Packinghouse Workers Local 721 v. Needham Packing Co.*, ... U.S. ....., 11 L.ed. 2d 680, 32 L. W. 4202 (Mar. 9, 1964). The policy of this line of cases extends to grievances of employes.[8]

3. The exhaustion principle normally applies to all persons who have an administrative remedy, including even those claiming the administrative tribunal itself is engaged in a violation of the law. Where an employe asserts a claim of violation of a contract that gives him a grievance-arbitration remedy for his claim, he is bound to exhaust the grievance-arbitration procedure before going to court. *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653; *Barker v. Southern Pacific Co.*, 214 F.2d 918 (9 Cir. 1954); *Griggs v. Transocean Airlines*, 176 Cal. App. 2d 843, 846, 1 Cal. Rptr. 803, 805. The basic doctrine was well set forth by Fowler Hamilton in *Individual Rights Arising*

8. Compare *Ferro v. Railway Express Agency, Inc.*, 296 F.2d 847 (2 Cir. 1961).

from Collective Labor Contracts, 3 Mo. L. Rev. 252, 267. This basic doctrine accords with the general doctrine that administrative remedies be exhausted before recourse to the courts, even though the administrative remedy is before the particular agency that is attacked as engaging in unlawful activity. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Holderby v. International Union of Operating Engineers*, 45 Cal. 2d 843, 291 P.2d 463; *Smith v. General Truck Drivers*, 181 F. Supp. 14 (S.D. Cal. 1960); *Durandetti v. Chrysler Corporation*, 195 F. Supp. 653 (E.D. Mich. 1961). Only after there has been an exhaustion of these remedies in an effort to get redress for the alleged grievances can it truly be said that there is a contract violation claim that is ripe for judicial consideration at the instance of one with standing to sue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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August 26, 1964

(Appendices Follow)

Appendix 1

United States Court of Appeals
for the Ninth Circuit

No. 18,324 — Feb. 28, 1963

Fred A. Alexander, Louis P. Camarota, George Cathro, Albert S. Dimond, Lewis Freeman, Frank Marani, Ray C. Marvin, James Newell and Earl D. Petersen,
Appellants;

vs.

Pacific Maritime Association, a non-profit corporation; International Longshoremen's & Warehousemen's Union, an unincorporated association; Ship Clerks Association, Local 34, ILWU, an unincorporated association; Joint Clerks Labor Relations Committee, San Francisco, an unincorporated association; H. J. Bodine, L. B. Thomas, William Chester, K. F. Saysette, J. A. Robertson and Hubert Brown as Trustees of ILWU-PMA Welfare & Pension Funds; Harry Bridges, H. J. Bodine, L. B. Thomas, K. F. Saysette, R. J. Pfeiffer, and Capt. C. Pryor as Trustees of ILWU-PMA Merchanization Fund; Does One thru Twenty,
Appellees.

Upon Appeal from the United States District Court
for the Northern District of California
Southern Division

OPINION

Before: Pope, Hamlin and Merrill, Circuit Judges

Merrill, Circuit Judge

This appeal is taken from judgment of the district court dismissing the action of the appellants upon the ground that the complaint did not state a claim within the court's jurisdiction. The holding of the district court was that the appellants were complaining of unfair labor practices under the National Labor Relations Act which were initially within the exclusive jurisdiction of the National Labor Relations Board. The correctness of this determination is the issue upon appeal.

Appellants are ship clerks employed at the Port of San Francisco. They are not union members. The central theme of their complaint is that the International Longshoremen's and Warehousemen's Union, their bargaining agent, with the co-operation of Pacific Maritime Association, the employers' bargaining agent, has discriminated against them and in favor of union members in the manner in which employment and employment benefits have been dispensed under the collective bargaining agreement.

Since the complaint charges both the union and the employer with discrimination against appellants solely on the basis of their nonunion status, §§ 8(a)(3), 8(b)(2) of the National Labor Relations Act would arguably apply to the conduct to which appellants object.[1] Accordingly, the dis-

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1. Under § 8(a)(3) an employer is prohibited from discriminating "in regard to hire or tenure of employment or any term or condition of employment to encourage • • • membership in any labor organization." Section 8(b)(2) places an equivalent restraint upon unions, by making it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection a(3) • • •." Finally, it is unfair labor practice, falling within § 8(b)(1), for a union to restrain or coerce employees in the exercise of § 7 rights, including the right to refrain from engaging in union activities.

trict court ruled, under San Diego Building Trades Council v. Garmon (1959) 359 U.S. 236, that initial jurisdiction lay exclusively with the National Labor Relations Board.

Appellants assert that this constituted error. They rely upon a line of cases which recognizes federal court jurisdiction to enforce the duty of fair representation owed by the unions to those they represent. Those cases, however, do not support appellants' contention. In none of them was there available any administrative remedy which would serve to deprive the federal courts of jurisdiction. Therefore the doctrine of primary jurisdiction of the National Labor Relations Board never was brought into play.

Many of the cases cited arose under the Railway Labor Act, which makes no provision for administrative means for correcting breaches of the duty of fair representation.[2] The remaining cases cited involved acts of discrimination which were not, even arguably, unfair labor practices under the National Labor Relations Act. As an example, the discrimination charged in Syres v. Oil Workers (1956) 350 U.S. 892, and Hardcastle v. Western Greyhound Lines (9 Cir. 1962) 303 F.2d 182, was against union members and was clearly not antiunion in character. Further, as distinguished from Radio Officers Union v. National Labor Relations Board (1954) 347 U.S. 17, there was in those cases no charge that the discrimination was aimed at securing active rather than merely passive union membership.

While resort to the federal courts was proper under those circumstances, it would be improper here in the face of the

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2. E.g., Conley v. Gibson (1957) 355 U.S. 41; Graham v. Brotherhood of Locomotive Firemen (1949) 338 U.S. 232; Tunstall v. Brotherhood of Locomotive Firemen (1944) 323 U.S. 210. Steele v. Louisville & N. R. R. (1944) 323 U.S. 192; Ferro v. Railway Express Agency Inc. (2 Cir. 1961) 296 F.2d 847.

competence of the National Labor Relations Board to handle the alleged discrimination.

If a claim cognizable by the federal courts is stated by the complaint herein, it is not, therefore, for the reasons asserted in the district court, but must be by virtue of § 301 of the Act[3] as construed by Smith v. Evening News Association (1962) 371 U.S. 195. In that case it was held that primary jurisdiction of the board does not apply to prevent the bringing of suit in the federal courts by an individual employee for violation of a collective bargaining agreement.

The opinion in that case was handed down by the Supreme Court while this appeal was pending. By that opinion the law was first established (contrary to the holding in Association of Westinghouse Salaried Employees v. Westinghouse Corporation (1955) 348 U.S. 437) that a claim of damages for breach of a collective bargaining agreement might under § 301 be asserted by an individual employee.[4] Since, in the court below, it was not understood that such was the law, the complaint is not couched in § 301 terms and the applicability of that section as construed in Smith v. Evening News is presented for the first time upon this appeal. This is the question to which we address ourselves.

The complaint alleges that ILWU is the exclusive collective bargaining agent for all ship clerks in the maritime

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3. "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

4. It should be noted that Smith v. Evening News specifically left undecided the question of the standing of employees to sue upon the various clauses of collective bargaining contracts. 371 U.S. 195, 201 n. 9.

industry on the Pacific Coast; that Local 34 is the organization designated by ILWU to represent ship clerks under that agreement for the Port of San Francisco; that Pacific Maritime Association is an Association of ship owners and maritime employers and is the collective bargaining agent for its members; that ILWU and Pacific Maritime Association have entered into a collective bargaining agreement which governs the employment of ship clerks in the Port of San Francisco.

The complaint alleges:

"That said bargaining agreement contains provisions that persons employed as Ship Clerks thereunder who constitute the full-time working force and depend on such work as Ship Clerks for their livelihood are designated as 'registered' Ship Clerks in said written agreement in contrast to those who are only seasonal or occasional members of the working force of Ship Clerks and who depend upon other employment for their principal livelihood and are not permanent full-time members of the regular working force. That said bargaining agreement designates said 'registration' and under Sec. 14 of the Master Agreement for Checkers and Related Classifications, there is provided:

'(a) All registration shall be by mutual consent, except that this section shall not deprive either party to the agreement from demanding additions to or subtractions from the registration lists as may be necessary to meet the needs of the port. When objecting to the registration of any man, members of the Joint Port Labor Relations Committee shall be required to give reasons therefor.

'(b) When it becomes necessary to drop men from the registration list, seniority on the list shall prevail.'

"That Sec. 15 of the Agreement provides:

'(a) When it becomes necessary to add men to the registration list, first preference of registration shall be given to men who now have partial or limited registration and employment in the industry; second preference of registration shall be given to men with previous registration in the industry who were not de-registered for cause; third preference of registration shall be given to men who had partial or limited registration in the industry and who were not de-registered for cause.

'(b) Suitable personnel with clerical background or experience in the maritime industry, longshoremen and other workers covered by contracts with the PMA and ILWU shall likewise be accorded preference of registration after the application of the preceding paragraph in registering additional clerks.' "

It is then alleged in substance that under the terms of the agreement registration is accomplished by the Joint Clerks Labor Relations Committee, which is composed of two members, one selected by Pacific Maritime Association and one by Local 34; that through its representative on this committee Local 34 has arbitrarily prevented the addition of names to the registered list and thus has prevented the registration of these appellants or of any ship clerks who are not union members.

It is further alleged:

"That within four years last past, on numerous occasions, and on February 9, 1962, each of the plaintiffs has duly and regularly requested and demanded that he be duly enrolled and 'registered' as a Ship Clerk by the defendant COMMITTEE under said bargaining agreement, but said COMMITTEE has and

does now wrongfully refuse, neglect and fail, without just cause or excuse, to enroll said plaintiffs or any of them as 'registered' Ship Clerks, but has and does now 'register' others who joined said industry and said permanent working force subsequent to said plaintiffs. That some of those in said four-year period to whom defendant COMMITTEE has granted 'registration' in preference to the plaintiffs, in violation of Sec. 15 of said Master Agreement, had no experience in the Maritime industry at the time of their said 'registration.' That each of the plaintiffs is entitled to 'registration' (and preference therefor) under said bargaining agreement to designate each a member of the full-time working force of Ship Clerks in the Port of San Francisco under said agreement, but said defendant JOINT COMMITTEE had and does now fail, refuse and neglect to make the ministerial act of entering each of said plaintiff's names into such list of full-time Ship Clerks employed in the Port of San Francisco, working under said bargaining agreement."

The complaint further alleges the manner in which appellants have suffered injury by virtue of this discrimination, including loss of vacation pay, contingent deferred wages and welfare, pension and health benefits.

The question is whether the alleged acts of discrimination constitute a breach of the collective bargaining agreement as well as an unfair labor practice under the act. In our view, they do not.

In Smith v. Evening News the breach was of a clause providing that there should be no discrimination against any employee because of union membership. No such clause

appears in the agreement before us. Section 3 of the agreement states:

> "There shall be no favoritism or discrimination in the hiring or dispatching or employment of any clerk qualified and eligible under the agreement * * *."

Appellants do not claim breach of this clause, and it is clear from other provisions that the agreement not to discriminate does not refer to the initial registration process, to which appellants object, but to the subsequent hiring, dispatch and employment of clerks already registered.

Appellants' case for a breach of contract, as we understand it, is restricted to this: that under § 14 the registered list is to be maintained at such dimensions as will meet the needs of the Port of San Francisco; that it is not so maintained that if it were, then under § 15 these appellants would be registered; that the failure of the joint committee to register these appellants is thus a breach of contract.

But the contract as alleged does not say this. There is no promise to maintain the registration at any level. The parties to the agreement may demand additions to meet the needs of the port, but there is no allegation that such a demand has been made. It may be that Local 34 owes these appellants a duty to make such a demand (they themselves having demanded registration), but if so such duty springs from the local's relationship to these appellants and not from the terms of the collective bargaining agreement.

We conclude that the complaint in its present form does not state a claim for breach of contract under § 301.

This is not to say, however, that the complaint cannot under any conceivable state of facts be amended to state a claim. We do not know, for example, that the parties to the agreement have not demanded additions to the regis-

tered list. Nor do we have any information (in the absence of any allegation of the relevant provisions of the agreement) respecting the contractual status of vacation pay and other fringe benefits. Leave to amend should therefore be granted.

Leave to plead further is, we feel, also justified by the fact that Smith v. Evening News has provided a potential basis for relief entirely different from that with which the parties and the district court were concerned.

Reversed and remanded with instructions that judgment be set aside; that leave be granted appellants within such time as may be fixed by the district court to file an amended complaint and for such further proceedings as may thereafter be appropriate.

(Endorsed) Opinion Filed Feb. 28, 1963.

Frank H. Schmid, Clerk.

Appendix 2

Excerpt from PMA's answer to petitioners' interrogatory with respect to the meaning of "registration" on the Pacific Coast waterfront.

The word "registration" is used in the present collective bargaining agreement and in the past collective bargaining agreements affecting ship clerks employed by employers represented by Pacific Maritime Association. It was used in the 1935 National Longshoremen's Award entered by the arbitrators appointed by President Roosevelt to settle the 1934 Pacific Coast maritime strike (Ex. E, Dep. of J. Paul St. Sure). The process of registration was required by that award as an element of the decision that there should be decasualization of longshore work on the Pacific Coast. The word "registration" defines the formal procedure by which ship clerks having full (Class A) [137] registration and those having limited (Class B) registration are given status as registered ship clerks in carrying out the decasualization of ship clerk work and are given identifications for purposes of administration of the collective bargaining agreement.

Persons having full (Class A) registration are those who remain from the original registration list developed in the thirties plus those who have been granted full (Class A) registration by action of the Joint Port Labor Relations Committee since the establishment of the initial list. The procedures under which applications are taken for the status of full (Class A) registered ship clerks are set forth in Exhibits 22, 23, 24 and 25 of the deposition of Paul St. Sure. The persons having limited (Class B) registration as ship clerks are those who have been placed on the limited (Class B) registration list by action of the Joint Port

Labor Relations Committee pursuant to the procedures adopted under the collective bargaining contract for the selection of such persons. Details in regard thereto are set forth in Exhibits 22, 23, 24 and 25 of the Deposition of Paul St. Sure. In addition to the men who have registration status other men do ship clerks' work in the Port of San Francisco without such status; these others have the designation "casual", "extra" or "Social Security" ship clerks and other similar designations to indicate that such men have not achieved registration status.

Registration status is first obtained as the result of filing a formal written application for a job as a limited (Class B) registration ship clerk when notice is publicly given that the Joint Labor Relations Committee will be taking applications. Copies of the forms of notice and applications used in the past are set forth in said Exhibits 22, 23, 24 and 25. A [138] copy of the 1963 application form is attached hereto. The Joint Labor Relations Committee reviews the applications filed in response to its notice that applications are being taken on the basis of applicable standards. Those previously used are set forth in said Exhibits 22, 23, 24 and 25. In substance, these are the objective tests to determine who are the best available applicants for ship clerks' jobs to do steady work on a permanent basis, working as interchangeable employees of the members of the Pacific Maritime Association in the San Francisco Bay Area and perhaps other employers who participate in their employment. The fully registered (Class A) ship clerks have first call on the assignment of all work as ship clerks in the San Francisco Bay Area - either by dispatch through the dispatching halls or through the continuing at will relationship with one particular employer - and normally will work until death or retirement or promotion to a job outside the

collective bargaining unit. The employers have successfully insisted that the tests for registration as full (Class A) registered ship clerks will be the most rigorous obtainable to determine whether such persons are the best men for those permanent and steady jobs. The limited registration (Class B) ship clerks have met certain of these tests for steady lifetime employment (when they become limited (Class B) registered clerks) and are in the process of going through a probationary period leading up to submission of applications for fully registered Class A registered status. The fully registered (Class A) ship clerks have permanent steady jobs based on their registration as such after having become limited (Class B) registration clerks, having adequately met the tests of probationary permanent employees during the period of limited (Class B) status and having met the subsequent tests applied by the Joint Labor Relations [139] Committee for full registration.

While the terms of registration of individual men provide that they may be deregistered if they are not needed to carry on the work in the port, outside of war periods it has been the policy of the employers and the unions to refrain from adding men to the list except where there is a reasonable expectation that such men will have permanent steady jobs until death, retirement or promotion outside the bargaining unit. Furthermore, the parties to the contract believe that such men should be in a position to have consistent substantial earnings on a permanent basis if they are to be given such a registration status by the Joint Labor Relations Committee. During recent years, when the industry has been engaged in a program of automation and mechanization, the parties have been unable to determine the exact number of men that could be given permanent steady jobs with the assurances referred to above and, accordingly, they

have not added men to the registration list during the period from 1957 to 1963.

Men [not registered] . . . either have not taken or have failed the tests for registered status. They are employed without meeting the rigorous standards for registration because they are used to work when there are insufficient registered men. They are not part of the registered work force of ship clerks who have passed the tests for either probationary or permanent registered status. Men who do not have registered status do not have the obligations to the industry or to the other registered ship clerks that are necessary incidents to their status of registered men. They can come and go as they wish and, in turn, they are [140] employed only on a day-to-day basis when needed and are subject to termination from the waterfront on any day with or without cause.

The steady, permanent jobs of registered men have many of the attributes of civil service jobs of government employees. The fully registered (Class A) ship clerk has tenure similar to a man who has attained permanent civil service status. The limited (Class B) registration ship clerk has a tenure similar to a man who has probationary civil service status and is moving toward permanent civil service status. The extra. casual, Social Security, etc. ship clerk has tenure comparable to a temporary employee such as for Christmas employees in the Post Office.

As a result of the decasualization program among longshore employees ("longshoremen" and "ship clerks") on the Pacific Coast, the quality of the worker is very high in comparison with similar workers in other portions of the world where such decasualization has not taken place. The desirability of the job, and hence the quality of the worker,

has been very high because of the permanent status that a registered ship clerk has, the regularity of his earnings, the other elements of security in the job which has been given to him, etc. The registered men have developed a status in the community, far different from that of casual waterfront workers in other parts of the world, arising out of their registered status, the pay procedures which lead to the pay check coming to the home rather than being cashed on the waterfront, etc. A man acquires this because he has met the prescribed tests and obtained, through the formal registration procedures of the Joint Labor Relations Committee, a permanent steady job having the described attributes, tenure, status and other qualities. **[141]**

[The copy of the six page 1963 registration form, which is attached to the answers to the interrogatory (Tr. R. 142-149), is not reprinted in this appendix.]